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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10

11 CARRIE R. CARROLL,

No. CIV.S-04-1333 DAD

12 Plaintiff,

13 v.

ORDER

14 JO ANNE B. BARNHART,  
15 Commissioner of Social  
Security,

16 Defendant.  
17 \_\_\_\_\_/

18 This social security action was submitted to the court,  
19 without oral argument, for ruling on plaintiff's motion for summary  
20 judgment and defendant's cross-motion for summary judgment. For the  
21 reasons explained below, the decision of the Commissioner of Social  
22 Security ("Commissioner") is affirmed.

23 **PROCEDURAL BACKGROUND**

24 Plaintiff Carrie Renee Carroll applied for Disability  
25 Insurance Benefits under Title II of the Social Security Act (the  
26 "Act"). (Transcript (Tr.) at 42-44.) The Commissioner denied

1 plaintiff's application initially and on reconsideration. (Tr. at  
2 26-30, 36-39.) Pursuant to plaintiff's request, a hearing was held  
3 before an administrative law judge ("ALJ") on October 9, 2003, at  
4 which time plaintiff was represented by an attorney. (Tr. at 188-  
5 208.) In a decision issued on January 23, 2004, the ALJ determined  
6 that plaintiff was not disabled. (Tr. at 9-18.) The ALJ entered the  
7 following findings:

- 8 1. The claimant met the disability insured  
9 status requirements of the Act on  
10 September 15, 1999, the date the  
11 claimant stated she became unable to  
12 work, and continues to meet them  
13 through December 31, 2002.
- 14 2. The claimant has not engaged in  
15 substantial gainful activity since  
16 September 15, 1999.
- 17 3. The medical evidence establishes that  
18 the claimant has severe generalized  
19 epileptic seizure disorder, but that  
20 she does not have an impairment or  
21 combination of impairments listed in,  
22 or medically equal to one listed in  
23 Appendix 1, Subpart P, Regulation No.  
24 4.
- 25 4. Neither the claimant nor the claimant's  
26 mother's testimony and reports of  
record are found to be credible for the  
reasons stated above.
5. The claimant has the residual  
functional capacity to perform work-  
related activities except for work  
involving working around dangerous  
machinery or unprotected heights.  
There are no other limitations (20 CFR  
§§ 404.1565 and 416.965).
6. The claimant's past relevant work as  
cashier/clerk, assistant manager and  
receptionist did not require the  
performance of work-related activities

precluded by the above limitation(s)  
(20 CFR §§ 404.1565 and 416.965).

7. The claimant's impairment does not prevent the claimant from performing her past relevant work.

8. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR §§ 404.1520(c) and 416.920(c)).

(Tr. at 17.) The Appeals Council declined review of the ALJ's decision on May 4, 2004. (Tr. at 4-6.) Plaintiff then sought judicial review, pursuant to 42 U.S.C. § 405(g), by filing the complaint in this action on July 6, 2004.

#### LEGAL STANDARD

The Commissioner's decision that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence and the proper legal standards were applied. Schneider v. Comm'r of the Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000); Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999). The findings of the Commissioner as to any fact, if supported by substantial evidence, are conclusive. See Miller v. Heckler, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Morgan, 169 F.3d at 599; Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985) (citing Richardson v. Perales, 402 U.S. 389, 401 (1971)).

A reviewing court must consider the record as a whole, weighing both the evidence that supports and the evidence that

1 detracts from the ALJ's conclusion. See Jones, 760 F.2d at 995. The  
2 court may not affirm the ALJ's decision simply by isolating a  
3 specific quantum of supporting evidence. Id.; see also Hammock v.  
4 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence  
5 supports the administrative findings, or if there is conflicting  
6 evidence supporting a finding of either disability or nondisability,  
7 the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d  
8 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an  
9 improper legal standard was applied in weighing the evidence, see  
10 Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

11 In determining whether or not a claimant is disabled, the  
12 ALJ should apply the five-step sequential evaluation process  
13 established under Title 20 of the Code of Federal Regulations,  
14 Sections 404.1520 and 416.920. See Bowen v. Yuckert, 482 U.S. 137,  
15 140-42 (1987). This five-step process can be summarized as follows:

16 Step one: Is the claimant engaging in substantial  
17 gainful activity? If so, the claimant is found  
not disabled. If not, proceed to step two.

18 Step two: Does the claimant have a "severe"  
19 impairment? If so, proceed to step three. If  
not, then a finding of not disabled is  
20 appropriate.

21 Step three: Does the claimant's impairment or  
22 combination of impairments meet or equal an  
impairment listed in 20 C.F.R., Pt. 404, Subpt.  
23 P, App. 1? If so, the claimant is conclusively  
presumed disabled. If not, proceed to step four.

24 Step four: Is the claimant capable of performing  
his past work? If so, the claimant is not  
25 disabled. If not, proceed to step five.

26 Step five: Does the claimant have the residual  
functional capacity to perform any other work?

1           If so, the claimant is not disabled. If not, the  
2           claimant is disabled.

3   Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995). The claimant  
4   bears the burden of proof in the first four steps of the sequential  
5   evaluation process. Yuckert, 482 U.S. at 146 n.5. The Commissioner  
6   bears the burden if the sequential evaluation process proceeds to  
7   step five. Id.; Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.  
8   1999).

### 9                                   **APPLICATION**

10           Plaintiff advances essentially two arguments in her motion  
11   for summary judgment. First, plaintiff asserts that the ALJ  
12   improperly discounted plaintiff's own testimony regarding the  
13   severity of her symptoms and the resulting limitations those symptoms  
14   place upon her. Second, plaintiff argues that the ALJ should have  
15   taken testimony from a vocational expert at the administrative  
16   hearing. The court addresses plaintiff's arguments below.

17           Beginning with plaintiff's first argument, it is well-  
18   established that the determination of credibility is a function of  
19   the ALJ, acting on behalf of the Commissioner. See Saelee v. Chater,  
20   94 F.3d 520, 522 (9th Cir. 1995). An ALJ's assessment of credibility  
21   should, in general, be given great weight. Nyman v. Heckler, 779  
22   F.2d 528, 530-31 (9th Cir. 1985). Thus, questions of credibility and  
23   resolution of conflicts in the testimony are functions solely of the  
24   Commissioner. Morgan, 169 F.3d at 599. In evaluating a claimant's  
25   subjective testimony regarding pain and the severity of his or her  
26   symptoms an ALJ may consider the presence or absence of supporting

1 objective medical evidence along with other factors. See Bunnell v.  
2 Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); see also Smolen v.  
3 Chater, 80 F.3d 1273, 1285 (9th Cir. 1996). Ordinary techniques of  
4 credibility evaluation may be employed, and the adjudicator may take  
5 into account prior inconsistent statements or a lack of candor by the  
6 witness. See Fair v. Bowen, 885 F.2d 597, 604 n.5 (9th Cir. 1989).

7           Nonetheless, an ALJ's rejection of a claimant's testimony  
8 must be supported by specific findings. Morgan, 169 F.3d at 599;  
9 Matthews v. Shalala, 10 F.3d 678, 679 (9th Cir. 1993) (citing Miller,  
10 770 F.2d at 848). Once a claimant has presented evidence of an  
11 underlying impairment, the ALJ may not discredit the claimant's  
12 testimony as to the severity of his or her symptoms merely because  
13 the testimony is unsupported by objective medical evidence. Reddick  
14 v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Light v. Chater, 119  
15 F.3d 789, 792 (9th Cir. 1997). Rather, "the ALJ can reject the  
16 claimant's testimony about the severity of [his or] her symptoms only  
17 by offering specific, clear and convincing reasons for doing so."  
18 Light, 119 F.3d at 792. See also Reddick, 157 F.3d at 722.

19           Here, plaintiff's medical records document a condition  
20 which might reasonably be expected to cause the symptoms alleged by  
21 plaintiff. However, while plaintiff alleges that she is totally  
22 unable to work due to the severity of her symptoms stemming from her  
23 epilepsy, the ALJ made specific and detailed findings in not fully  
24 crediting plaintiff's testimony in this regard. For example, the ALJ  
25 found that plaintiff's failure to take her medication as prescribed  
26 damaged her credibility. The ALJ's finding that plaintiff did not

1 consistently take her medication is supported by the record. (Tr. at  
2 132, 126.) The Ninth Circuit has explained that a claimant's failure  
3 to follow a prescribed course of treatment without adequate  
4 explanation may cast doubt on the sincerity of the claimant's  
5 testimony. See Smolen, 80 F.3d at 1284; Bunnell, 947 F.2d at 346;  
6 Fair, 885 F.2d at 603.

7           The ALJ also found plaintiff less than credible due to the  
8 various inconsistent statements attributable to her set forth in the  
9 record. Plaintiff testified at the administrative hearing that she  
10 experienced "four to five" seizures per month. (Tr. at 192.)  
11 However, while there appears to be an occasional spike in plaintiff's  
12 seizure activity (see Tr. at 125, 174), her treatment records as a  
13 whole reflect that she suffers approximately one or two seizures per  
14 month (see Tr. at 134, 132, 130, 126, 124, 121, 128, 172, 173).  
15 Plaintiff also testified to taking her medication "every morning and  
16 night like the doctor has told me to." (Tr. at 198.) That statement,  
17 however, is also not supported by plaintiff's medical records which  
18 indicate that she often forgot to take her medication. (Tr. at 126,  
19 132.)

20           Substantial evidence also supports the ALJ's observation  
21 that plaintiff both complained of more frequent seizures to her  
22 physician and expressed skepticism regarding the effectiveness of her  
23 medication regimen only after she was initially denied disability  
24 benefits. (Tr. at 174-77.) The notes prepared by plaintiff's  
25 treating physician prior to that denial typically reflect plaintiff's  
26 subjective complaints, for example, as "one seizure since last here"

1 (Tr. at 124); "had two noct[urnal] seizures" (Tr. at 121); and "two  
2 seizures since last here." (Tr. at 128.) In contrast, the note made  
3 by plaintiff's physician following the initial denial of benefits in  
4 plaintiff's case tellingly contained the following complaint reported  
5 by plaintiff: "claims to have had 7 seizures since last here in  
6 10/02. Feels vagus nerve stimulator is of no benefit, and that drugs  
7 are not working. Is seeking SSDI, and asks if I have documented all  
8 her [seizures] ...." (Tr. at 174.) The timing of these changes in  
9 the symptoms reported by plaintiff provide further support for the  
10 ALJ's specific findings with respect to plaintiff's credibility.

11 Finally, despite plaintiff's alleged disability onset date of  
12 September 15, 1999, and her claim that she has been experiencing  
13 seizures and taking medication for those seizures since she was five  
14 years old, the ALJ accurately noted the absence of any medical  
15 records submitted by plaintiff dated prior to April, 2001.

16 For these reasons the court finds that the ALJ fairly  
17 characterized the record and sufficiently stated specific, clear and  
18 convincing reasons for not fully crediting plaintiff's testimony  
19 regarding the severity of her symptoms. See Tidwell v. Apfel, 161  
20 F.3d 599, 602 (9th Cir. 1998). Plaintiff's argument to the contrary  
21 must be rejected.<sup>1</sup>

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23 <sup>1</sup> In her motion plaintiff also briefly contests the ALJ's  
24 treatment of the testimony of plaintiff's mother at the  
25 administrative hearing. Plaintiff's mother testified very briefly at  
26 the administrative hearing. (Tr. at 202-07.) She essentially  
supported her daughter's testimony that, despite taking her  
medication as prescribed, plaintiff suffers from two to five seizures  
a month with a two to three day recovery period. (Tr. at 204.) In  
discussing the content of plaintiff's treatment notes regarding the



1 Plaintiff's other main argument is that the ALJ erred in  
2 not hearing testimony from a vocational expert regarding plaintiff's  
3 ability to perform her past work as a cashier/clerk, assistant  
4 manager and receptionist. However, the issue of whether vocational  
5 expert testimony is necessary does not arise until step five of the  
6 sequential analysis. Specifically, at that step, the Commissioner  
7 can satisfy the burden of showing that the claimant can perform other  
8 types of work in the national economy, given the claimant's age,  
9 education, and work experience, by either: (1) applying the medical-  
10 vocational guidelines ("grids") in appropriate circumstances; or (2)  
11 taking the testimony of a vocational expert. See Polny v. Bowen, 864  
12 F.2d 661, 663 (9th Cir. 1988); Burkhart, 856 F.2d at 1340 (citing  
13 Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d 573, 578 (9th  
14 Cir. 1988) (Pregerson, J., concurring)).

15 Here, the ALJ determined that plaintiff had the residual  
16 functional capacity to perform her past work. While testimony from a  
17 vocational expert could have been considered by the ALJ in  
18 determining whether plaintiff had the ability to perform her past  
19 relevant work, the ALJ was not required to call a vocational expert  
20 at the fourth step of the sequential evaluation. See Matthews, 10  
21 F.3d at 681 ("In the instant case, since Matthews failed to show that

22 \_\_\_\_\_  
23 frequency and severity of her seizures; plaintiff's failure to follow  
24 the prescribed medical treatment; and the lack of treatment records  
25 covering the relevant time period, the ALJ also provided specific  
26 reasons for expressly disregarding the testimony of plaintiff's  
mother. See Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001) ("In  
all, the ALJ at least noted arguably germane reasons for dismissing  
the family members' testimony, even if he did not clearly link his  
determination to those reasons.").

1 he was unable to return to his previous job as a receiving  
2 clerk/inspector, the burden of proof remained with Matthews. The  
3 vocational expert's testimony was thus useful, but not required.").  
4 Plaintiff's argument that testimony from a vocational expert was  
5 required is therefore unpersuasive.

6 Finally, in her motion for summary judgment plaintiff  
7 briefly takes issue with the ALJ's treatment of the opinion of Steve  
8 McIntire, M.D., an examining physician who conducted a neurological  
9 evaluation of plaintiff. (Tr. at 141-44.) Plaintiff emphasizes that  
10 Dr. McIntire opined that plaintiff "would have significant functional  
11 limitations." (Tr. at 144.) However, as the ALJ accurately pointed  
12 out, that conclusion was based on Dr. McIntire "assuming that the  
13 reported frequency of seizure's is accurate[.]" (Id.) As noted  
14 above, substantial evidence supports the ALJ's determination that  
15 plaintiff's testimony regarding the frequency of her seizures was not  
16 accurate. Further, Dr. McIntire explained that he did not have  
17 plaintiff's medical records or any other diagnostic material to base  
18 an opinion upon, explaining that he had only "one brief clinic  
19 report" and that review of various diagnostic testing results would  
20 be "worthwhile." (Tr. at 143.) Accordingly, the court finds that  
21 the ALJ sufficiently articulated specific and legitimate reasons  
22 supported by substantial evidence in not fully crediting the opinion  
23 of Dr. McIntire. See Lester, 81 F.3d at 830-31 (explaining that ALJ  
24 cannot disregard testimony of examining physician without providing  
25 specific and legitimate reasons for doing so); Pitzer v. Sullivan,  
26 908 F.2d 502, 506 (9th Cir. 1990) (same).

**CONCLUSION**

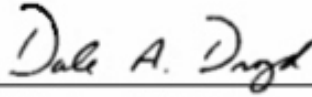
Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment is denied;

2. Defendant's cross-motion for summary judgment is  
granted; and

3. The decision of the Commissioner of Social Security is  
affirmed.

DATED: August 30, 2005.



DALE A. DROZD

UNITED STATES MAGISTRATE JUDGE

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